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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947.

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No. 180. MISC.

—
MYRA TANNER WEISS, *Petitioner,*

VS.

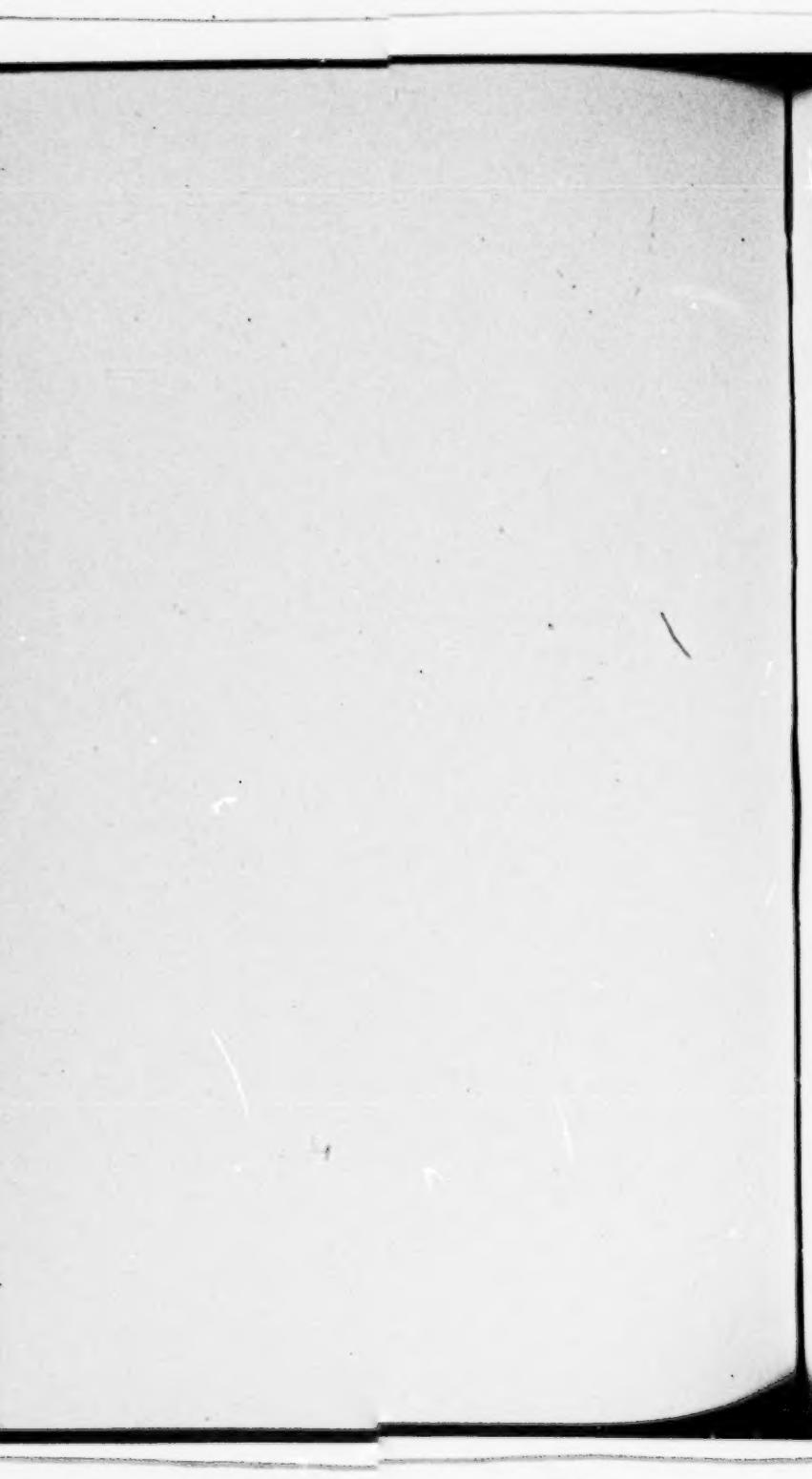
LOS ANGELES BROADCASTING COMPANY, INC., CALVIN SMITH
and LUCILLE BLAKE.

—
Petition for a Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit.

—
BRIEF FOR THE RESPONDENTS IN OPPOSITION.

—
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OPINION BELOW.

The opinion of the court below is reported at 163 F. 2d 313. The opinion of the District Court of the United States for the Southern District of California (Vol. I, 23-26) is not reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered August 6, 1947. A petition for rehearing and, in the alternative, a motion to remand the cause with directions that the Petitioner be permitted to file an amended complaint, was denied September 6, 1947. Petition for certiorari was filed November 18, 1947. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether or not the amended complaint states a cause of action.
2. Whether or not Section 315 of the Communications Act of 1934 creates a cause of action in the Petitioner.
3. Whether or not the court below abused its discretion in denying the motion to remand the cause to permit the Petitioner to amend.

STATUTE INVOLVED.

Section 315 of the Communications Act of 1934 (48 Stat. 1088), is set forth in the appendix.

STATEMENT.

The statement of the case by the Petitioner is correct so far as it goes, but the following additional circumstances are relevant. This case arose from the deletion of certain statements from a proposed political broadcast by the Petitioner, who was running for the office of Mayor for the City of Los Angeles (Vol. I, 5). The Petitioner had purchased radio time from the Los Angeles Broadcasting Company for this purpose (Vol. I, 6). On April 1, 1945, at the hour of 8:45 P. M. Petitioner did broadcast her speech as submitted to the radio station (Vol. I, 6), but prior to the broadcast certain portions thereof had been deleted there-

from by the radio station (Vol. I, 6). The portions deleted contained remarks defamatory *per se* directed against the then President of the United States, the then Mayor of the City of Los Angeles, and another candidate for the office of Mayor of the City of Los Angeles (Vol. I, 8), and certain statements whereby the Petitioner gratuitously and on her own behalf and not with the consent of the candidate, attempted to espouse the cause of one Charlotta Bass for the office of Councilman of the Seventh District of the City of Los Angeles (Vol. I, 6). No time had been purchased from the Los Angeles Broadcasting Company by the Petitioner for the purpose of broadcasting a program for and on behalf of Charlotta Bass for City Council, or for any candidate for this office (Vol. I, 3-5). The radio station had not, prior to the broadcast in question, ever sold any radio time nor had it permitted its facilities to be used by any candidate for the political office of City Council in the City of Los Angeles (Vol. I, 5).

The Petitioner alleged in her amended complaint that by the deletion of these defamatory statements and the refusal to permit her to espouse the case of some other person for the office of City Council, she, as a candidate for Mayor, suffered damages in the amount of \$4,000.00 (Vol. I, 19), and also was entitled to recover exemplary or punitive damages in the amount of \$1,000.00 (Vol. I, 11).

ARGUMENT.

I.

No important question is presented by the correct ruling of the court below that the amended complaint did not state a cause of action.

In its opinion the court below held that the amended complaint failed to state a cause of action because (a) it did not allege at the time of the actions complained of, the respondent corporation was a licensee of the Federal Communications Commission and hence subject to the pro-

visions of Section 315 of the Communications Act of 1934; (b) that it failed to allege that there were any other legally-qualified candidates for the office of Mayor of Los Angeles so as to make applicable to the present case the provisions of Section 315, and (c) that it failed to allege that other candidates, whether legally qualified or not, had used the station of the respondent corporation so as to bring the Petitioner within the provisions of Section 315.

(The court also held the complaint defective upon a serious matter of substance to be discussed under the next heading.)

All three of the foregoing grounds of the decision of the court below relate to the failure of the complaint to set forth sufficient facts. They constitute a ruling by the Circuit Court of Appeals concerning the text of a specific, isolated pleading. They do not conflict with the decision of any other Circuit Court of Appeals. They decide no important question of general law or of federal law, nor do they in any way depart from the usual course of judicial proceedings. The argument in the brief in support of the petition for a writ of certiorari (Headings IA, B and C), are all to the effect that the general tenor of the Petitioner's amended complaint is such that the missing allegations are available through inference and presumption. Cf. *Garrett v. Louisville and Nashville Railroad Co.*, 235 U. S. 308.

The unwillingness of the court below to bolster a defective complaint by means of inference and presumption raises no question of sufficient importance to justify the issuance of a writ of certiorari.

II.

Section 315 of the Communications Act does not create a cause of action in a person who undertakes to purchase time from a licensed radiobroadcasting station for a political address.

The portions of the Communications Act of 1934 which deal with radio broadcasting constitute a scheme of licensing and are not intended to establish or describe private rights. Where the Communications Act of 1934 does specify the rights of private parties, it does so in its common-carrier provisions such as Sections 207, 209 and 407, which are taken from the Interstate Commerce Act as it, prior to 1934, provided for the regulation of telephone and telegraph public utilities (See *The Individual Right to Initiate Administrative Process*, and particularly the section *Administrative Law and Private Action*, 25 Iowa Law Review 485; condensed in Pike and Fischer, *Administrative Law*, Volume 5, Articles and Reports, Pages 39, 45).

"The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission". *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U. S. 134, 138.

See also *Amalgamated Utility Workers et al. v. Consolidated Edison Company of New York, Inc., et al.*, 309 U. S. 261, 263. *Federal Trade Commission v. Klesner*, 280 U. S. 19.

A case such as *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470, which permits a private party to vindicate the public interest through litigating errors of law by the federal regulatory body is possible only because of the specific provisions in the Communications Act allowing private parties a specific, limited review where they are "aggrieved or ad-

versely affected" by action of the *Commission*. Communications Act of 1934, Section 402.

III.

The court below did not abuse its discretion in denying the motion to remand with directions that the petitioner be permitted to file an amended complaint.

The original complaint apparently was filed May 14, 1945 (See Footnote 5 of the opinion of the court below.)

Leave to amend was undoubtedly granted as the result of some earlier proceedings as the amended complaint was filed December 12, 1945. In the view of the District Court, "the plaintiff has no claim and cannot state a claim 'upon which relief can be granted'" (Vol. I, 23).

Apparently the Petitioner agreed that her complaint could not be improved by further amendment because she stood upon her complaint and forthwith filed her notice of appeal. At no time did she attempt to file any further amended complaint with the District Court.

The Circuit Court of Appeals not only found the complaint defective in the aspects listed earlier in this brief, but it also held, "the court below correctly held that the complaint did not state a claim upon which relief could be granted" (page 316).

The Circuit Court of Appeals was in agreement, apparently, that there was no likely amendment which could cure the basic failure of the complaint to state a cause of action.

Notwithstanding that liberality is encouraged in the granting of leave to amend pleadings, it is also true that refusal to grant leave to amend upon dismissing a complaint for insufficiency is not subject to appellate review except where an abuse of discretion is shown. E.g., *C. E. Stevens Company v. Foster and Kleiser Company*, 9 Cir., 1940, 109 F. 2d 764, *Aetna Casualty and Surety Company v. Abbott*, 4 Cir., 1942, 130 F. 2d 40. In the latter case the opinion by Mr. Justice Parker cites Rule 15(a) of the Federal Rules of Civil Procedure, 28 USCA., following Sec-

tion 723(c) and relies upon *Gormley v. Bunyan*, 138 U. S. 623.

CONCLUSION.

The decision below is correct. There are no conflicting decisions. The petition for writ of certiorari should be denied.

Respectfully submitted,

LOS ANGELES BROADCASTING COMPANY, INC.,
CALVIN SMITH and LUCILLE BLAKE,

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APPENDIX.

Sec. 315. If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.